For the above reasons we dismiss the appeal with costs to the respondents. The deposit to be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitor: *Khoo & Sidhu; R.K. Nathan & Co.*

MUNUSAMY v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Mohamed Azmi & Wan Hamzah S.C. JJ.) July 23 & November 27, 1986]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 6 of 1986]

Criminal Law and Procedure – Trafficking in dangerous drug – Duty of trial judge at end of prosecution case – Prima facie case – Question of law whether there is evidence not inherently incredible to prove essential ingredients of charge – Necessity to evaluate and weigh evidence – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(f), 180, 181(1) & 190.

Evidence – Adverse inference – Withholding or suppression of evidence – Evidence Act, 1950, s. 114(g).

Dangerous Drugs – Trafficking in – Informer – Chemist's opinion – Dangerous Drugs Act, 1952, ss.37(da)(vi), 39 & 40.

This was an appeal from the conviction of the appellant for the offence of trafficking in cannabis, a dangerous drug. The appellant was sentenced to death. On appeal, the conviction was attacked on five main grounds. The argument on the first three grounds evolved around the provision of adverse inference under section 114(g) Evidence Act 1950 on (a) the non-production of the unknown informer, (b) the non-production of the typist of the Chemistry Department, and (c) the absence of accuracy certificate in respect of the weighing machine used by the Government Chemist. The fourth ground of appeal was concerned with the opinion of the Chemist that the substance sent to him for analysis was cannabis as defined in the Dangerous Drugs Act. It was argued that the opinion should not be accepted as it was based on defective analysis. The fifth ground was directed towards the following passage in the judgment of the learned trial judge in calling for the appellant to enter his defence: "I accepted the evidence of Insp. Khoo, DPC Lian and ASP Ahmad. They all gave their evidence in a manner highly indicative of their having no axe to grind and their having to give evidence on account of their duty to do so. They were neither vindictive nor self-righteous. They impressed me as witnesses of truth. I therefore called for the accused to enter on their defence, satisfied that there was a *prima facie* case for him to answer."

It was argued that in accepting the credibility of the prosecution witnesses at that stage of the trial the learned trial judge ran foul of the principle of law as laid down by the Privy Council in *Haw Tua Tau* v. *Public Prosecutor.*[4]

Held: (1) it is essential to appreciate the scope of section 114(g) of the Evidence Act, 1950 lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but a material document by a party in his possession nor for non-production of just any witness but only an important and material witness to the case;

(2) in regard to the non-calling of the informer in this case, the protection of section 40(1) of the Dangerous Drugs Act, 1952 clearly applies since the evidence showed that all the informer did was to accompany the police officer and introduce him to the appellant;

(3) there was overwhelming evidence that the cannabis produced in court was indeed the one recovered by the police from the appellant and the evidence was sufficient to rebut any adverse inference under section 114(g) Evidence Act so as to render the calling of the typist as a prosecution witness, to show the clerical mistake in addressing the exhibits, wholly unnecessary;

(4) in this case the amount of cannabis was shown to be more than 600 grammes of the drug, although only 200 grammes are sufficient to attract the presumption of trafficking under section 37(da)(vi) of the Dangerous Drugs Act and therefore whatever inaccuracy there might be in the weighing machine (for which there is no evidence) is covered by the legal maxim *"de minimis non curat lex"*;

(5) in this type of cases where the opinion of the Chemist is confined only to the elementary nature and identity of the substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the Chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step;

(6) it is obvious that there is nothing in the *Haw Tua Tau* case to suggest that the *prima facie* case approach as understood in criminal trials in this contrary is wrong in principle. On the contrary that case re-establishes once and for all that there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. There is accordingly no rejection of the "established beyond reasonable doubt" test provided that it is applied at the stage of the trial in the hypothetical form;

(7) in considering the question of law whether there is some evidence (not inherently incredible) to prove one or more of the essential ingredients of the offence the judge or magistrate must by necessity evaluate and weigh all the evidence. If there is no evidence at all to prove one or more of the essential ingredients of the offence the accused must be acquitted without calling for his defence. The requirement of section 180 or section 173 (f) of the Criminal Procedure Code cannot be properly complied with unless the judge or magistrate considers and evaluates all the evidence adduced by the prosecution as tested in cross-examination;

(8) in the present case the learned trial judge did not

err in dealing with the credibility of the witnesses at the close of the prosecution case. If he had dealt with the accuracy of the testimony he merely erred in favour of the appellant in placing too high a burden on the prosecution before calling for the defence. Further the fact that the learned trial judge had considered extensively in his judgment the evidence addressed by the defence, shows that he did actually keep an open mind on questions of fact as to the actual guilt of the appellant until the close of the defence case.

Cases referred to:

(1) *Public Prosecutor* v. *Neoh Seow Aun Perak Criminal* Trial No. 12 of 1985.
(2) *Public Prosecutor* v. *Teyu Baba alias Teo Boo Bak* Perak Criminal Trial No.13 of 1980.
(3) *Public Prosecutor* v. *Lau Hing alias Lou Beng Heng & Anor.* Perak Criminal Trial No. 2 of 1981.
(4) *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49, 52.
(5) *Ong Kiang Kek* v. *Public Prosecutor* [1970] 2 M.L.J. 283.
(6) *Ragunathan* v. *Public Prosecutor* [1982] 1 M.L.J. 139.
(7) *Public Prosecutor* v. *Chin Yoke* [1940] M.L.J. 47.
(8) *Public Prosecutor* v. *Man bin Abas* (1935) 1 M.C. 160.
(9) *Lee Pin Seng* v. *Public Prosecutor* [1986] 2 M.L.J. 416.
(10) *Zahari bin Yeop Baai & Anor.* v. *Public Prosecutor* [1980] 1 M.L.J. 160.
(11) *Yau Heng Fang* v. *Public Prosecutor* [1985] 2 M.L.J. 335.
(12) *Public Prosecutor* v. *Lim Teong Seng & Ors.* [1946] M.L.J. 108.

SUPREME COURT.

Gurubachan Singh (*Kartar Singh* with him) for the appellant.

B. Sarala Pillai (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court): The appellant was convicted under section 39B(1)(a) Dangerous Drugs Act 1952 at the High Court Ipoh of trafficking in 1,400 rolls of cannabis weighing 649.5 grammes and sentenced to death under section 39B(2). The offence was alleged to have been committed on November 15, 1983 at about 8.40 p.m. at the front of an unnumbered house at Aulong Lama, Aulong, Taiping. The prosecution case of trafficking by the appellant was based almost entirely on the evidence of Inspector Khoo Guan Leong (PW2) and DPC Lian Kia Hock (PW4) of the anti-narcotic branch, Ipoh, who on instruction by their superior went to Taiping on November 15 as undercover agents, to trap the appellant at an unnumbered house, with another police party in ambush position. In fact it was part of the prosecution case that a day earlier on November 14, DPC Lian had gone with an informer to appellant's house, where the informer had introduced the appellant to him as "Pak Chik". During that meeting DPC Lian had made arrangement with the appellant to supply him with ganja the next day. In the result DPC Lian had in fact initiated the trap on November 14 by negotiating with the appellant for the purchase of the drugs after receiving information from the informer, although the only material part taken by the informer was to introduce DPC Lian to the appellant. The next day on November 15, Inspector Khoo was assigned to complete the drug transaction, together with DPC Lian. On the evidence before him, the learned trial judge accepted the testimony of Inspector Khoo and DPC Lian that during the trap on the 15th, the appellant did supply them with two packages of ganja (cannabis). During the transaction, the appellant left on his bicycle and after about five minutes returned with the two packages, and later he also helped Inspector Khoo to unwrap one of them. On a prearranged signal, the other police party in ambush came forward and arrested the appellant. The police took possession of the two packages together with the bicycle and the bicycle key. On analysis by the government chemist, Mr. Ng Cheng Chai (PW6), it was confirmed that the two packages contained 1,400 rolls of cannabis weighing a total nett weight of 649.5 grammes. At the close of case for the prosecution, the learned judge found a *prima facie* case had been made out against the appellant. The defence was based on the allegation that the whole episode on the 15th was a frame-up by the police. According to the appellant (DW1) and his wife (DW2), the two packages which contained ganja were placed on the carrier of his bicycle by the informer who had come to his house with DPC Lian at about 7.30 p.m., saying that they would come back to collect the packages at about 8.30 p.m. Later DPC Lian returned not with the informer, but with Inspector Khoo who took possession of the packages and gave instruction for his arrest. He denied knowledge of the contents of the packages and claimed that he had nothing to do with the ganja. The learned trial judge considered the entire evidence of the defence and found it had not raised a reasonable doubt on any vital part of the prosecution case. Accordingly, he found the appellant guilty as charged.

Before us the conviction is being attacked on five main grounds. The argument on the first three grounds evolves around the provision of adverse

inference under section 114(g) Evidence Act 1950 on (a) the unknown informer; (b) the typist of the Chemistry Department; and (c) the absence of accuracy certificate in respect of the weighing machine used by the government chemist. It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

We shall deal with the first ground which concerns the informer, who had introduced DPC Lian to the appellant a day before the accused was arrested. Section 40(1) Dangerous Drugs Act gives protection against discovery not only to an informer, but also to any complaint lodged as to an offence under the Act in both criminal and civil proceedings. However, the court has a discretion to remove the protection in certain circumstances under section 40(3) which provides:

"(3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer."

Clearly, the second limb of the sub-section relied upon by Mr. Gurubachan Singh for the appellant, cannot apply to the present criminal trial. It is only in proceeding of a civil nature *i.e.* proceeding other than a trial for an offence under the Act, the court has a discretion to remove the protection against discovery, if it "is of opinion that justice cannot be fully done between the parties". In his frame-up defence, the appellant and his wife sought to prove that the informer with DPC Lian had participated in the crime by placing the two packages of cannabis on the carrier of his bicycle without his knowledge. The trial judge rejected the frame-up story allegedly committed by the informer and DPC Lian. It is now put in argument before us that the learned judge was wrong in law in failing to conclude that the failure to call the informer as a witness would attract the adverse inference against the prosecution under section 114(g) Evidence Act. Obviously the provision of section 114(g) cannot be misused in that fashion for the purpose of overcoming the statutory protection given to informers by section 40(1) Dangerous Drugs Act. Further it must be noted that no application was made during the trial for the exercise of the court's discretion under section 40(3). Indeed, its provision was not even referred to the court. Be that as it may, for reason already stated we are not pursuaded that the provision relied upon can be applied in this case. Mr. Gurubachan Singh has also referred to us the judgment of Anuar J. in *Public Prosecutor* v. *Neoh Seow Aun*[1]. There, one of the three grounds for acquittal was that the two informers who had taken very active part in the commission of the offence by the accused, were not called or offered to the defence by the prosecution, and it was successfully argued that they were not in fact informers within the meaning of section 40(1) and as such the adverse inference under section 114(g) applied. The Public Prosecutor's appeal against acquittal was eventually withdrawn. In our opinion whether a person is an informer or has become an active *agent provocateur* would depend on the facts of each particular case. In the instant case the protection under section 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under section 114(g).

The second ground of appeal concerns the identification of the 1,400 rolls of cannabis produced in court. The argument put before us is that the wrong cannabis had been produced because both the envelope (Exhibit P10) containing the chemist report and as well as the chemist report itself (Exhibit P8) were addressed to the OCPD "Sungei Siput" and not to the OCPD "Taiping". According to Mr. Gurubachan Singh the trial judge was wrong in accepting the evidence of prosecution witnesses that the reference to "Sungei Siput" was a typing error because by dispensing with the evidence of the typist who was available in court, an adverse inference under section 114(g) Evidence Act should have arisen against the prosecution. The answer must depend on whether the typist is really a material and important witness having regard to the whole chain of evidence on the exhibits. The clerical error explanation by the investigating officer ASP Ahmad and Mr. Ng the government chemist, was considered and accepted by the trial judge, although the typist responsible for the error did not give evidence. The learned judge held that

it was not essential to call the typist notwithstanding her presence in court. We find no valid reason to disagree with the learned judge's finding. The chemist report contained official particulars of (a) the Police Constable from whom the Chemistry Department had received the exhibit (*viz.* DPC 65573 Mat Said). (b) the officer to whom they were handed back after analysis (*viz.* detective Cpl. 56682 Zakaria), (c) the police report number (*viz.* Aulong Report 839/83), (d) the Chemistry Department laboratory number (*viz.* IP 6472/83), and (e) the Royal Malaysian Police seal No. 92. These official particulars tallied with those in the official receipt (Exhibit P6) issued by the chemist when he received the exhibits from Taiping Police. In our view the official particulars in the two documents when considered in the light of the evidence given by the investigating officer, the chemist, Inspector Khoo and DPC Lian, would leave no room for doubt that the chemist report could only refer to the case under appeal and not to some other case originating in Sungei Siput. They constitute sufficient evidence to prove that the chain of evidence on the drug exhibits had not been broken from the time they were recovered from the appellant to the time they were produced in court. There can be no doubt about the typing error in this case, particularly when there was evidence that "Aulong" was in Taiping and there was no such place in Sungei Siput. The fact that the exhibits and the envelope containing the chemist report were handed personally to detective Cpl. 56682 of Taiping by the Chemistry Department was further proof that they had nothing to do with Sungei Siput. There is therefore no merit in the argument that the 1,400 rolls of cannabis produced in court were the wrong exhibits. In our view, there was overwhelming evidence that the cannabis produced in court were indeed the ones recovered by the police from the appellant, and the evidence were sufficient to rebut any adverse inference under section 114(g) Evidence Act so as to render the calling of the typist as a prosecution witness, wholly unnecessary.

The appellant's argument on the third ground which concerns the accuracy of the weighing instrument used by the chemist Mr. Ng, can be disposed of shortly, since the argument is clearly based on another misunderstanding of the scope of section 114(g) Evidence Act. What happened at the trial was that under cross-examination, the chemist was requested to produce the certificate of testing of his weighing instrument. On resumption of hearing , on January 16, 1986, a certificate of testing dated May 31, 1985 from the Inspector of Weight and Measure was produced and marked as Exhibit D15. The chemist admitted in evidence that he had no certificate for this particular instrument for the years prior to 1985, although the instrument was checked by the Chemistry Department itself prior to that year. Thus, the only official certificate in his possession was Ex. D15. In those circumstances, how could it be said that the prosecution had withheld or suppressed documentary evidence in their possession so as to raise an adverse inference under section 114(g)? There was evidence that the weighing instrument used in this case was called an analytical balance. Its accuracy had been checked by standardization test which consisted of a piece of standard weight with which the instrument was calibrated. The fact that the instrument had been so tested and found to be accurate had not been contradicted by other evidence. We think that a lot of fuss had been made on the accuracy of the weighing instrument. Since exhibit D15 had shown that the instrument was accurate in May 1985, it is unreasonable to infer that it was defective in 1984. In any event, we are here dealing not with a few grammes of cannabis but with more than 600 grammes of the drug, although only 200 grammes are sufficient to attract the presumption of trafficking under section 37(da)(vi), and as such whatever inaccuracy there might be in the weighing instrument (for which there is no evidence) it is covered by the legal maxim *de minimis non curat lex* (the court does not deal in trivialities).

The fourth ground of appeal is concerned with the expert opinion of the chemist Mr. Ng that the substance sent to him for analysis was cannabis as defined in the Dangerous Drugs Act. We are invited to conclude that Mr. Ng's opinion ought not to have been accepted as it was based on defective analysis. Let us examine the evidence. The chemist report contained the following expert opinion of Mr. Ng:

> "I examined the packages submitted and on analysis found:
>
> *In package 'A':* four newspaper packets containing four hundred paper rolls having a total of 199.3 g. (nett) of cannabis;
>
> *In package 'B':* two newspaper packets containing one thousand paper rolls having a total of 450.2 g. (nett) of cannabis.
>
> Cannabis is as defined in the Dangerous Drugs (Amendment) Act 1980."

As to how he came to his opinion, Mr. Ng gave *inter alia* the following testimony:

> "I conducted physical examination on the materials within

the paper rolls. I satisfied myself that all the contents of all the rolls were identical and of similar material. I performed colour test, microscopic examination, and thin-layer chromatography to identify the nature of the material. I found all of them to be cannabis. In package 'A', I found 199.3 grammes net of cannabis. In package 'B', I found 450.2 grammes net of cannabis which to the layman is known as ganja. (Last para of P8 referred). Cannabis is defined as dangerous drug in the Dangerous Drug (Amendment) Act 1980."

On the above evidence, we find it difficult to appreciate the validity of various criticisms levelled at Mr. Ng. There was no dispute that Mr. Ng had been a chemist with the Chemistry Department for 12 years. He possessed a B.Sc. degree in Chemistry and Biology, and had given expert evidence in court, and such evidence had been accepted in the High Court in drug cases. As a rule, a chemist in drug cases does not give any opinion as to ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine their identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting, trade mark, copy right or ballistic experts. Without being derogatory it is common knowledge that even animals, such as snuff dogs when sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that is this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step. We are deeply concerned with the laxity in which the trial judge had allowed Mr. Ng to be examined and cross-examined for nearly two days. In his judgment, the learned judge observed that Mr. Ng was subjected to vigorous cross-examination and that he withstood the barrage of questions stoically and emerged unscratched. We are unable to see the purpose of putting the chemist through such ordeal although we note that he was also cross-examined on other issues in which he had no expert knowledge. The uncontradicted evidence of Mr. Ng which we have cited earlier, is more than sufficient to prove that all the 1,400 rolls sent to him by the police contained a total of 649.5 grammes of cannabis, and there is no necessity to enlighten the court on the details in respect of each of the two packages. Two High Court cases on section 37(j) decided by Anuar J. have been referred to us – *Public Prosecutor* v. *Teyu Baba @ Teo Boo Bak*[2] and *Public Prosecutor* v. *Lau Hing @ Low Beng Heng & Anor.*[3]. We note that the facts in both cases are entirely different because the prosecution were in fact relying on the presumption of that sub-section. It is not so in the case before us. Further in *Lau Hing* case the chemist who gave evidence was found to be not an expert and accordingly the appeal of the Public Prosecutor against acquittal was dismissed. In *Teyu Baba* case the accused was acquitted without his defence being called on the ground that the chemist failed to state in his report that the substance which he analysed was "candu" within the meaning of the Act. There the chemist was not called to give evidence and since the appeal by the Public Prosecutor is still pending, it should be dealt with at the appropriate time, when the respondent is traced. As regards the method of weighing, Mr. Ng obtained the weight of the cannabis by subtracting the weight of the rolls last cover (*i.e.* paper wrapper together with label and rubber bands on the wrapper) from the gross weight of the 1,400 rolls. There should be no objection to such method. To quote the analogy of the learned judge, it is not necessary to weigh an actual ship in order to obtain its weight. In our view, there was no necessity to invoke the presumption under section 37(j), since the chemist's opinion was emphatic that the whole 649.5 grammes of the vegetative substance was cannabis. Further it is too far-fetched to refer to each of the 1,400 rolls as "receptacles" for the purpose of that sub-section.

The fifth and final ground of appeal is directed towards the following passage in the judgment of the learned trial judge in calling for the appellant to enter on his defence:

"I accepted the evidence of Inspector Khoo, DPC Lian and ASP Ahmad. They all gave evidence in a manner highly indicative of their having no axe to grind and their having to give evidence on account of their duty to do so. They were neither vindictive nor self-righteous. They impressed me as witnesses of truth. I therefore called for the accused to enter on his defence, satisfied that there was a *prima facie* case for him to answer."

Mr. Gurubachan Singh submits that in accepting the credibility of prosecution witnesses at that stage of the trial, the learned judge had run foul of the principle of law as laid down by the Privy Council in *Haw Tua Tau* v. *Public Prosecutor*[4] which is applicable to criminal trials where the

combined roles of decider of law and decider of fact are vested in a single judge. We have been told that as decider of fact the learned judge ought not to have made up his mind on issues of fact at the close of case for the prosecution, and by doing so, he had committed an error of law which merits our interference. The question for determination is, to what extent, if any, the case of *Haw Tua Tau* is intended or has the effect of changing the *"prima facie* case" approach adopted by the learned judge in calling for the appellant's defence? In our opinion there is none in substance although there may be a difference in language. Lord Diplock's reference to *Ong Kiang Kek* v. *Public Prosecutor*[5] was necessary in order to explain the effect of the words "if unrebutted" in section 188(1), although the issue before the Judicial Committee was the constitutionality of the Singapore Criminal Procedure Code (Amendment) Act 1976. The new Act brought a significant change in criminal procedure in Singapore. When calling for the accused to enter on his defence, instead of the three options being given to him which is still the established practice in this country (*i.e.* he can either give evidence on oath and be subjected to cross-examination, or give unsworn statement from the dock, or remain silent) a standard allocution is read out to him which contains all the elements of the new sections 188 and 195. In dealing with the 1970 judgment of the Singapore Court of Appeal, Lord Diplock in effect ruled that in failing to apply the "established beyond reasonable doubt" test in its hypothetical form, that case had placed too high a burden on the prosecution in terms of section 188(1) before the court had the duty and right to call the accused to enter on his defence. To our mind, that is what Lord Diplock meant when he explained at page 52 that such a test "ignores the presence in the section of the crucial words 'if unrebutted' " and "it converts the hypothetical question of law .... into an actual and quite different question of fact ....". In *Ragunathan* v. *Public Prosecutor*[6], on the question of what ingredients the prosecution must prove to establish a *prima facie* case, Raja Azlan Shah acting L.P. (as he then was) in adopting *Haw Tua Tau* case had this to say at page 141:

> "Applying that principle, the learned Magistrate at the close of the prosecution case had to determine as a question of law whether on the evidence as adduced and unrebutted, the appellant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. That is the question raised in the appeal. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact that the applicant is guilty as charged."

Our section 180 C.P.C. (applicable to trial before a single judge) and section 190 (applicable to a trial before a judge with assessors) are *in pari materia* with Singapore section 188(1). Section 180 provides:

> "When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence."

It is obvious that there is nothing in *Haw Tua Tau* case to suggest that the *"prima facie* case" approach as understood in criminal trials in this country and enunciated in *Public Prosecutor* v. *Chin Yoke*[7], is wrong in principle. On the contrary, in overruling the various passages in *Ong Kiang Kek* on the effect of section 188(1) (formerly section 177C) it re-establishes once and for all that there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of case for the prosecution. There is accordingly no rejection of the "established beyond reasonable doubt" test, provided it is applied at that stage of the trial in the hypothetical form. Thus, under section 180, the judge must ask himself on the basis of credible evidence, a mere hypothetical question: "If I were to accept the prosecution's evidence as accurate, would it establish the case against the accused beyond a reasonable doubt?". Putting it in the *"prima facie* case" form: "On the assumption that the prosecution's evidence was accurate, could the accused be lawfully convicted?". If the answer to either question is in the affirmative, then a case is said to have been made out which, if unrebutted; would warrant a conviction, and in such a case the accused should be called upon to state his defence. It must necessarily follow that if the accused elected to remain silent and called no evidence the court must convict him since the hypothetical position obtained pursuant to section 180 that the prosecution evidence would not and could not be rebutted, has become a reality (see *Public Prosecutor* v. *Man bin Abas*[8]). Although our Section 173(f) C.P.C. is worded differently, the same test must apply to criminal trials before a magistrate (see *Lee Pin Seng* v. *Public Prosecutor*[9]). It is therefore wrong under sections 173(f), 180 and 190 of the C.P.C. for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ulti-

mate decision must be postponed until the end of the trial after the defence has given evidence and close its case. In substance, this is what Gordon Smith Ag. J.A. meant when he held in 1940 in *Public Prosecutor* v. *Chin Yoke* (*ante*) at page 38:

". . . . . that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the *prima facie* case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence."

In 1980, the principle contained in the above passage was applied by Hashim Yeop A. Sani J. (as he then was) in *Zahari bin Yeop Baai & Anor.* v. *Public Prosecutor*[10]. In the circumstances, we do not find anything wrong in the trial judge's approach, when calling for the appellant to enter on his defence. He was clearly correct in being satisfied that the prosecution had made out a *prima facie* case for the appellant to answer according to the principle laid down in *Haw Tua Tau* and explained in *Ragunathan.*

In considering the question of law whether there is some evidence (not inherently incredible) to prove one or more of the essential ingredients of the alleged offence, a judge or magistrate must by necessity, evaluate and weigh all the evidence. If there is no evidence at all to prove one or more of the essential ingredients of the offence, the accused must be acquitted without calling for his defence. The requirement of section 180 or section 173(f) C.P.C. cannot be properly complied with unless the judge or magistrate considers and evaluates all the evidence adduced by the prosecution as tested in cross-examination. There is nothing in *Haw Tua Tau* to suggest that for the purpose of proving the essential ingredients of the alleged offence, the words "if unrebutted" in section 180 mean that even if the evidence on primary facts adduced by the prosecution are inherently incredible or the witnesses are found to be untruthful or unreliable, the court must presume that they are respectively true and truthful and must in all cases call for the defence. There must be some credible evidence to prove the essential ingredients of the charge, which in all cases must necessarily include the identity of the accused (see *Yau Heng Fang* v. *Public prosecutor*[11]). Cases involving the acquittal of the accused without defence being called on ground of identity, such as found in *Public Prosecutor* v. *Lim Teong Seng & Ors.*[12], could easily have been justified on the failure of the prosecution to prove an essential ingredient of the charge without the necessity of ignoring or circumventing the statutory burden imposed by sections 173(f), 180 and 190. In the present appeal, the learned trial judge did not therefore err in dealing with the credibility of the witnesses at the close of the prosecution case. In our opinion, if he had dealt with the accuracy of the testimony, he merely erred in favour of the appellant in placing too high a burden on the prosecution before calling for the defence. Further, the fact that the learned trial judge had considered extensively in his judgment the evidence adduced by the defence, shows that he did actually keep an open mind on questions of fact as to the actual guilt of the appellant until the close of defence case. In the result we also find no merit on this last ground of appeal.

For the reasons discussed, we find no real substance in this appeal to merit our interference. The appeal against conviction is dismissed and the sentence is affirmed.

Appeal dismissed.

Solicitors: *Bachan & Kartar.*

WEE HUI HOO v. PUBLIC PROSECUTOR

[A.Cr.J. (Chong Siew Fah J.) September 20, 1985]

[Sibu – Criminal Appeal No. 21 of 1984]

Road Traffic – Driving recklessly or in a manner dangerous to the public – Two distinct offences – Charge bad for duplicity – Whether there was a failure of justice – Road Traffic Ordinance 1960 (Sarawak) (repealed), ss. 28(1) & 29(1) – Road Traffic Ordinance 1958 (Federal), s. 34A.

Criminal Law and Procedure – Charge bad for duplicity – Effect of.

The accused was convicted of an offence under section 29(1) of the Road Traffic Ordinance 1960 and sentenced to a fine of $500. His driving licence for all classes except for Class One was cancelled for one year and he was disqualified from applying for a new driving licence for two years. The charge read as follows:

"That you, on the 14th day of June, 1980, at about 8.00 a.m. at Oya Road, Mukah (near the Three Rivers Secondary